Office - Supreme Court, U. S.
FILED
NOV 15 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 748.

JOHN L. VEST, - - - - - - - - Petitioner,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of The Taylor National Bank of Campbellsville, Kentucky, - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ERNEST WOODWARD,
Louisville, Ky.,
Counsel for Petitioner.

JAMES E. FAHEY,
WOODWARD, DAWSON & HOBSON,
Of Counsel.

November 13, 1941.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1– 8

I. Summary Statement of the Matter Involved. 1– 6

II. Reasons Relied on for Allowance of the Writ 7

III. Prayer for Writ 7– 8

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 9–27

I. Opinion of the Court Below 9

II. Jurisdiction 9–10

III. Statement of the Case 10

IV. Specification of Errors 10–11

V. Argument 11–26

The Court Erred in Holding that the Petitioner Violated the National Bank Act in Making the Loan Involved Herein, and More Particularly that Section Thereof Which Appears in 12 U. S. C. A., Sec. 375a and Which is Set Out *Supra* at Page 6 11–21

The Court Erred in Holding that in Making the Loan Set Out Above, Morton Played the Role of Borrower Only, and in that of Representative of the Bank 21–23

The Court Erred in Holding this Case to be Controlled by the Decision of this Court in *Deitrick* v. *Greaney* (1940), 309 U. S. 190, thus Deciding that this Court in that Case Overruled Its Former Decision in *Deitrick* v. *Standard Surety & Casualty Co.* (1938), 303 U. S. 471 24–26

Conclusion 27

ALPHABETICAL LIST OF AUTHORITIES.

PAGE

Anderson v. Missouri State Life Ins. Co. (C. C. A. 6th), 69 Fed. (2d) 794 22

Connecticut Life Ins. Co. v. Commercial National Bank (C. C. A. 5th), 87 Fed. (2d) 968 23

Curtis, Collins & Holbrook Co. v. United States, 262 U. S. 215 23

Deitrick v. Greaney (1940), 309 U. S. 190 ..... 6, 7, 11, 24, 25, 26

Deitrick v. Standard Surety & Casualty Co. (1938), 303 U. S. 471 ..... 7, 11, 23, 24, 25, 26

Marks v. Kindle (C. C. A. 2d), 41 Fed. (2d) 584 16

Maryland Casualty Co. v. Queenan (C. C. A. 10th), 89 Fed. (2d) 155 23

Monroe v. Harriman National Bank (C. C. A. 2d), 85 Fed. (2d) 493 23

Patrick v. Arkansas National Bank, 172 Ark. 1103, 292 S. W. 143 18

Pemigewasset Bank v. Rogers, 18 N. H. 255 ..... 17, 18

Rankin v. City National Bank, 208 U. S. 541 23

Seneca County Bank v. Neass, 5 Denio (N. Y.) 329 .. 17

Skud v. Tillinghast (C. C. A. 6th), 195 Fed. 5 23

United States v. Choteau, 102 U. S. 603 ..... 20, 21

Wagner v. Kohn (C. C. A. 2d), 225 Fed. 718 ..... 14, 15

Table of Statutes Cited.

12 U. S. C. A., Sec. 83 24

12 U. S. C. A., Sec. 375a 6, 10, 11

12 U. S. C. A., Sec. 592 ..... 6, 12

18 U. S. C. A., Sec. 550 ..... 6, 12, 13

28 U. S. C. A., Sec. 347 10

Uniform Negotiable Instruments Act, Sec. 18 16

Supreme Court of the United States

OCTOBER TERM, 1941.

No._____

JOHN L. VEST, - - - - - - - *Petitioner,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK OF CAMPBELLSVILLE, KENTUCKY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, John L. Vest, is an attorney residing at Walton, Kentucky.

The respondent, Federal Deposit Insurance Corporation, is a corporation created by an Act of the

Congress of the United States and is the duly appointed, qualified and acting Receiver of The Taylor National Bank of Campbellsville, Kentucky, hereinafter referred to as the Bank, having been appointed as such Receiver on August 24, 1937.

In 1931 the petitioner became acquainted with T. O. Morton, who was at that time president and chief executive officer of the Bank, and from this acquaintance there developed a close and intimate friendship between Morton and the petitioner. On January 24, 1935, without any previous arrangement, the petitioner and Morton met casually in Louisville, Kentucky. Morton informed the petitioner that he needed $10,000.00 for personal use, but that he did not wish to borrow this sum from a bank other than his own. He explained that the Bank had on hand ample funds to make the loan, but that he preferred not to borrow from his own bank. He requested the petitioner to sign an accommodation note for him in the amount of $10,000.00, payable to the Bank, and agreed that if petitioner would do this, he would pledge ample collateral to secure the amount borrowed and that petitioner would never have to pay the loan. In reliance upon these representations, petitioner agreed to and did execute an accommodation note in the face amount of $10,000.00, and Morton gave him a written memorandum listing the collateral to be pledged.

The transaction was handled through the Bank of Commerce at Louisville, Kentucky. Morton received the $10,000.00 and the securities agreed upon were de-

livered to the Bank. Petitioner received none of the money and derived no benefit from the transaction.

The petitioner, at Morton's request, executed five renewals of the obligation, the fifth bearing date of January 12, 1937. The original note and all renewals contained a notation setting forth the collateral pledged to secure them. The interest on the loan was paid by Morton, but no part of the principal had been paid when the Bank suspended active business on June 30, 1937.

The collateral pledged for the loan was found in the custody of the Bank, held to secure the loan, on September 3, 1935, by a National Bank Examiner, but at a subsequent date not disclosed by the record, Morton fraudulently converted the collateral to his own use, along with other Bank assets.

When the Bank closed, Morton was charged with violation of the national banking laws, indictments were returned and after trial resulting in verdicts of guilty, Morton was sentenced to terms in federal prison. This fact is stated as it was due to the manipulations of Morton and his efforts to secure money for his personal use that the transaction disclosed by this record occurred.

Upon assuming control of the Bank's affairs, the respondent found collateral of the value of $4,000.00 pledged on the note, which collateral was subsequently determined to be the property of persons who had placed it in the Bank for safe keeping. Its use by Morton as collateral on the loan was unauthorized and it has been recovered in this action by its owners. Un-

til the last of March or early April of 1937 the petitioner did not know that any of the collateral originally pledged upon the loan had been removed. After learning of the withdrawal of the collateral, petitioner, on April 12, 1937, went before the Board of Directors of the Bank and disclosed to them the facts with reference to the loan and the removal of the collateral.

The petitioner at no time authorized or agreed to the withdrawal of the collateral pledged to secure the loan and Morton removed it and used it for his own purposes without the knowledge of petitioner.

From the time of the petitioner's first acquaintance with Morton until the suspension of business by the Bank, Morton was not only the president and chief executive officer of the Bank, but also owned 76 per cent of its capital stock and was in exclusive control of the Bank and directed all of its operations. He dominated the Board of Directors and the Loan Committee of the Bank, and exercised the corporate will of the Bank in all matters. The acts of all other officers were merely perfunctory. The Bank was a typical one-man concern (Findings of Fact of the trial court, T. R. 153-158).

On November 9, 1937, the respondent filed its bill in equity against the petitioner in the District Court of the United States for the Eastern District of Kentucky, in which it sought to recover from the petitioner the principal amount of the last renewal note in the above transaction, together with interest which had accrued subsequent to the Bank's failure. The District Court concluded (see Opinion of the District

Court, T. R. 147-151, and Conclusions of Law of the District Court, T. R. 158-159), that, in obtaining the loan from the bank upon the note which Morton induced the petitioner to sign, the latter dealt with Morton in his capacity as president and chief executive officer of the Bank; that Morton was acting within the scope of his authority and that because Morton was the Bank's sole representative in procuring the note, the Bank could not claim any right to it except such as it acquired through Morton. It concluded that the Bank could not take the benefit of Morton's act without also taking the burdens resulting from the agreement which he had made and under which he procured the execution of the note and the withdrawal of the collateral pledged. Since the evidence clearly showed a breach of the contract pursuant to which the note was executed, notice of which under the "sole actor" doctrine was imputed to the Bank, recovery was denied.

Upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit, the ruling of the District Judge was reversed and a decree entered remanding the case to the District Court, with directions to enter a decree against the petitioner for the amount sought in the respondent's petition (T. R. 165). The Circuit Court of Appeals based its decision (see Opinion of the Circuit Court of Appeals, T. R. 166-173), upon those sections of the National Bank Act which provide in part:

> "No executive officer of any member bank shall borrow from or otherwise become indebted to any member bank of which he is an executive officer, and no member bank shall make any loan or extend credit in any other matter to any of its own executive officers: * * *" (12 U. S. C. A., Sec. 375a).

And further:

> "* * * Every person who * * * aids or abets any officer, director, agent, employee or receiver in any violation of this section shall be deemed guilty of a misdemeanor * * *" (12 U. S. C. A., Sec. 592).

It is also provided:

> "* * * Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal" (18 U. S. C. A., Sec. 550).

The Court concluded that by virtue of these statutes petitioner's agreement with Morton was unlawful and, relying upon *Deitrick* v. *Greaney* (1940), 309 U. S. 190, it held that the benefit of this agreement as a defense to the note should be denied the petitioner.

The petitioner's petition for rehearing was denied on October 10, 1941 (T. R. 221), and this petition for writ of certiorari follows:

II.

REASONS RELIED ON FOR ALLOWANCE OF THE RETURN.

1. The question presented by the record below concerns the administration of the National Bank Act and as such is one of public importance which has not been, but should be, settled by this Court.

2. The question as to what extent, if any, the decision of this Court in *Deitrick* v. *Greaney* (1940), 309 U. S. 190, overrules the decision of this Court in *Dietrick* v. *Standard Surety & Casualty Co.* (1938), 303 U. S. 471, is directly presented in the record below and is one which has not been, but should be, settled by this Court.

III.

PRAYER FOR WRIT.

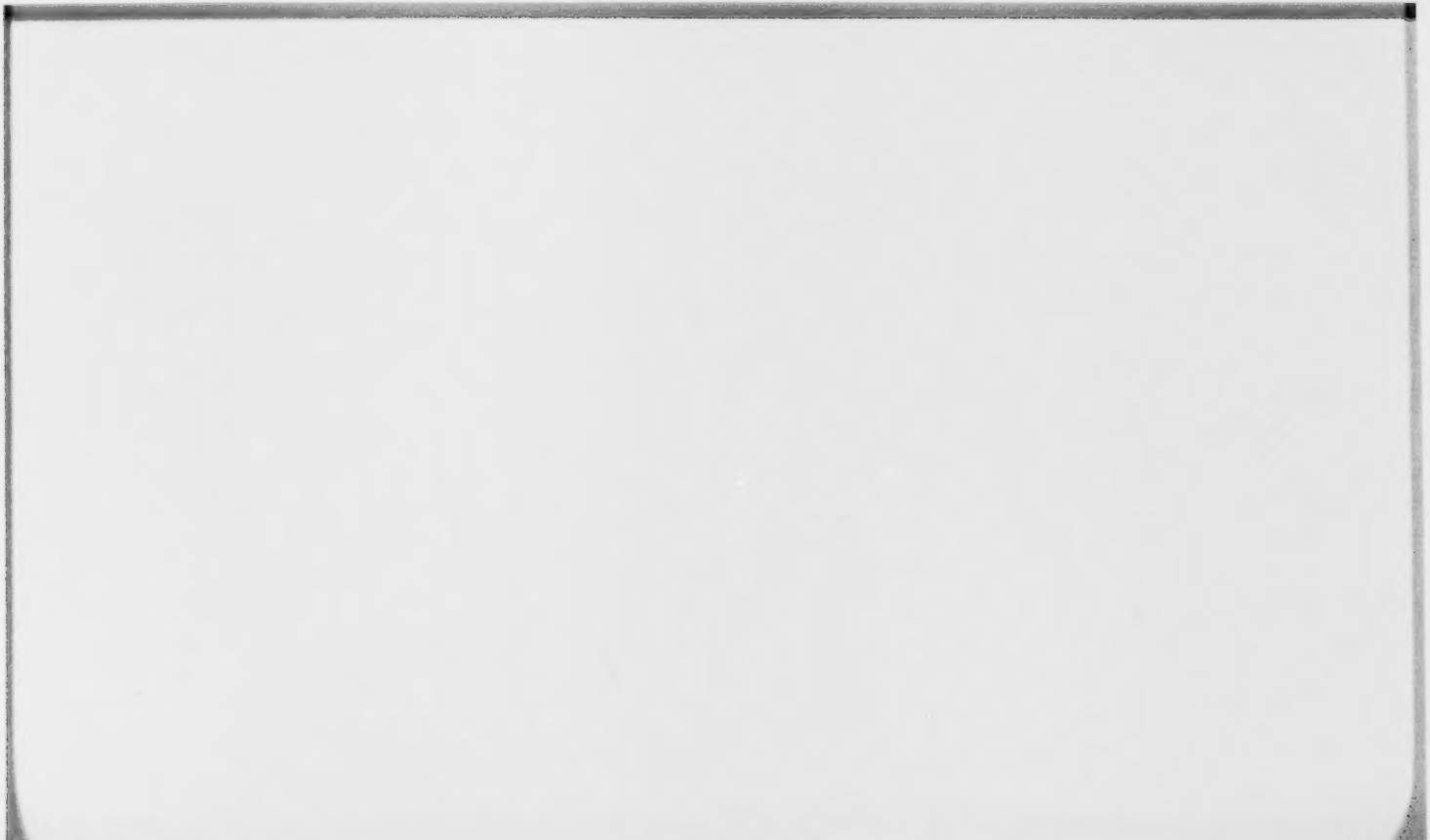
WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings of that Court had in this case, which is numbered and entitled on its docket 8567, Federal Deposit Insurance Corporation, Receiver of The Taylor National Bank

of Campbellsville, Kentucky, Appellant, v. John L. Vest, Appellee, to the end that this cause may be reviewed and determined by this Court, and that the judgment of that Court be reversed, and for such further relief as to this Court may seem proper.

JOHN L. VEST,
Petitioner,

By ERNEST WOODWARD,
Louisville, Ky.,
Counsel for Petitioner.

JAMES E. FAHEY,
WOODWARD, DAWSON & HOBSON,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1941.

No._____.

JOHN L. VEST, - - - - - *Petitioner,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK OF CAMPBELLSVILLE, KENTUCKY, - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit (T. R. 166-173) was handed down on May 14, 1941, and is reported in 119 Fed. (2d) 834.

II.

JURISDICTION.

1. The decree of the United States Circuit Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered May 14, 1941 (T. R. 165),

and a petition for rehearing was denied October 10, 1941 (T. R. 221).

2. The statutory provision which is relied upon to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

III.

STATEMENT OF THE CASE.

The statement appearing at pages 1 to 6 in the petition for writ of certiorari is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner intends to urge and rely upon each of the following errors assigned to the decree of the United States Circuit Court of Appeals for the Sixth Circuit:

1. The Court erred in holding that the petitioner violated the National Bank Act in procuring the loan in question and more particularly that section thereof which appears in 12 U. S. C. A., Section 375a, and which is set out *supra* at page 6.

2. The Court erred in holding that in making the loan here involved Morton played the role of borrower only and not that of representative of the Bank.

3. The Court erred in holding this case to be controlled by the decision of this Court in *Deitrick* v. *Greaney* (1940), 309 U. S. 190, thus deciding that this Court in that case overruled its former decision in *Deitrick* v. *Standard Surety & Casualty Co.* (1938), 303 U. S. 471.

V.

ARGUMENT.

The Court Erred in Holding That the Petitioner Violated the National Bank Act in Making the Loan Involved Herein, and More Particularly That Section Thereof Which Appears in 12 U. S. C. A., Section 375a and Which Is Set Out *Supra* at Page 6.

The opinion of the Circuit Court of Appeals assumes that the execution of the original note was a criminal act in contravention of 12 U. S. C. A., Section 375a, *supra.*

It is to be noted that the petitioner was not an executive officer of the Bank. Certainly Morton did not actually borrow $10,000.00 from the Bank and did not become indebted to the Bank. No money was lent or credit extended to any officer of the Bank when the loan was made to the petitioner. The petitioner was solvent and there was pledged to secure the loan collateral of a value materially in excess of the amount borrowed. If the statute was violated, it was because the petitioner intended to deliver the proceeds of the

loan to Morton and relied upon Morton's promise to secure the loan and eventually to pay it.

The opinion of the Circuit Court of Appeals pointed out that under 12 U. S. C. A., Section 592, it is a criminal violation of the National Bank Act for any person, with subversive intent, to aid or abet an officer of a national bank in the willful misapplication of its money, and that by 18 U. S. C. A., Section 550, whoever directly commits any act constituting an offense defined in any law of the United States, or aids, counsels or procures its commission, is a principal. The Court then held that the petitioner, by active connivance with Morton, permitted his note and its renewals to remain as receivables among the assets of the Bank for more than two years for the admitted purposes of concealing the fact that Morton was a borrower from his own bank.

The first statute cited by the Court (12 U. S. C. A., Section 592) is applicable to the instant case only if the petitioner executed the note "with intent to defraud or injure" the Bank by aiding and abetting a willful misapplication of its moneys. The trial court's Finding of Fact conclusively show that such facts did not exist. There was no intent to defraud or injure on the petitioner's part, and no misapplication of the Bank's moneys. The maker of the note was solvent and the collateral was ample. It is true that months later Morton misappropriated the collateral on this particular note, just as he converted collateral on other notes, but the fact that petitioner delivered the pro-

ceeds of the note to Morton had no connection with the subsequent conversion of the collateral.

The second statute relied upon by the Court (18 U. S. C. A., Section 550) is equally inapplicable to the instant case. No act was committed by petitioner constituting an offense unless it was a criminal act for him to borrow money on his own amply secured note, with an agreement that Morton might have the proceeds and pay the loan.

The lending of petitioner's credit to Morton was neither illegal nor immoral. It resulted in no injury to the Bank. The loss was suffered solely by reason of Morton's unlawful conversion of the pledged securities. This conversion occurred at least seven months after petitioner made the note because the collateral which Morton represented to petitioner would be used was found and reported as securing the loan by the National Bank Examiner in his report of September 3, 1935 (T. R. 90). It was then worth $14,300.00.

No loss had then occurred to the Bank. The subsequent conversion of the collateral could not be anticipated. It is submitted that the loss caused by Morton's independent act must fall on the Bank because it selected him and held him forth as worthy of public trust.

The Circuit Court of Appeals held that the petitioner connived with Morton in order that the latter could borrow $10,000.00 from his own bank and thus the pertinent statutes were violated. But the authorities clearly establish that Morton was not a borrower from the Bank and in holding him to be such

it is submitted that the Circuit Court of Appeals committed error.

In *Wagner* v. *Kohn* (C. C. A. 2d), 225 Fed. 718, the receiver of the Mount Vernon National Bank sued to recover on a note made to the bank by the defendant. The note was one made for the accommodation of the Westchester County Brewery Company. The Company had borrowed from the bank all it could obtain and prevailed upon the defendant to execute his note to the bank, secured by collateral furnished by the Company, and to deliver to the Company the proceeds of the loan, which amounted to $2,000.00. The bank converted the collateral and the Receiver sued to secure recovery on the note. The Court held that the defendant was entitled to have set off against his liability on the note the value of the collateral at the time of its conversion, stating:

> "It [the note] is a collateral note, and that fact appears by its recital and the testimony conclusively establishes that the collateral was in fact deposited. The evidence shows that before this action was brought the collateral was surrendered by the bank without defendant's knowledge and cancelled. * * * In the absence of a special agreement to resort first to the collateral, the plaintiff as holder of the note was under no obligation to realize upon the collateral before suing upon the note. * * * On the conversion of the collateral the pledgor was entitled to sue the pledgee *in trover,* and in such an action, the debt being unpaid, the pledgee is entitled to have the amount of the debt deducted from the damages. * * * But the

collateral having been converted, if the pledgee sues the pledgor, should not the same principle be applied, and the value of the collateral be deducted from the amount of the debt? * * * It is true that the bonds deposited as collateral belonged to the Brewery Company and were not the property of the defendant, but we are unable to discover that under the circumstances of this case that fact confers upon the bank or its receiver, as against this defendant, the right to convert the bonds and not be charged with the proceeds in an attempt to recover against him on the note. The defendant had a special property in the bonds so deposited because of the agreement the company made with him. If the Company had not agreed that its bonds might be used as collateral for the note, defendant would have given no note. The money for which the note was given was money paid to enable the Company to discharge its debt to defendant and the understanding between the Company and defendant was that the Company was to pay the note which was given for the accommodation. The collateral was given for the protection of the defendant as well as for the protection of the bank."

As in the case quoted from, so in the case at bar. Neither the letter nor the spirit of the statutory provisions relied upon by the Circuit Court of Appeals prohibited petitioner from borrowing $10,000.00 on a note amply secured by Morton's collateral. The fact that petitioner borrowed this money for Morton's benefit and relied upon Morton's promise to pay the loan was not forbidden by law and did not actually harm

the Bank. Only loans to officers are condemned by the statutory provisions, and where a loan is made to a solvent borrower and secured by ample collateral, the fact that an officer of the bank may be interested in the application of the proceeds from that loan is within the ambit of the statute.

Morton was not liable to the Bank on the note. The Uniform Negotiable Instrument Act in force in Kentucky provides in Section 18:

> "No person is liable on the instrument whose signature does not appear thereon except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name."

This section was construed in *Marks* v. *Kindle* (C. C. A. 6th), 41 Fed. (2d) 584, where the Court stated:

> "Furthermore, long before the adoption of this Act by the various states, it was the rule in many jurisdictions that the undisclosed principal of the signer of a negotiable paper could not be charged with the act of his agent."

It is stated in *Meachem on Agency,* Vol. 1, Section 1122:

> "Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent."

Since the petitioner was amply solvent and his note was amply secured, there was no actual fraud in the transaction, and since Morton was not the maker of the note, he was not liable thereon.

It has been held in *Seneca County Bank* v. *Neass,* 5 Denio (N. Y.), 329, and in *Pemigewasset Bank* v. *Rogers,* 18 N. H. 255, that where officers who were prohibited by State law from borrowing from their own banks in excess of certain designated amounts prevailed upon third persons to obtain loans with their collateral and to deliver to them the proceeds of the loans, the applicable statutes were not contravened.

In the *Seneca County Bank* case the Court stated:

> "There is nothing in the contention that the original agreement by which Mercer [the bank officer] procured the note of Lee [the accommodation maker] was made in fraud of the Act regulating money to corporations or to deceive the Bank Examiner. The bank had made loans to Mercer beyond what is lawful. Of this he informed Lee. At the same time he requested Lee to let him have his notes with which he could effect his purpose and with which he paid and took up the illegitimate paper. This appears to have been done in good faith and not as a shift to present a temporary appearance of the soundness of the bank. The substituted note appears to have remained permanently the property of the bank. * * * We see nothing wrong in this."

In the *Pemigewasset Bank* case, in discussing the prohibitive State statutes, the Court stated:

> "This section has for its object to prohibit any director to become indebted or liable to the bank to an amount exceeding half his stock by any note, bond or any other promise or undertaking whatever. It may be conceded that any such promise, written or underwritten, would by force of the statute be wholly void.
>
> "But such is not the note under consideration, which is not the evidence of any liability whatever on the part of Rogers [the bank officer]. It has taken the place of a note upon which he was at the time of the exchange legally holden; but he is not a party to this in any form whatever, nor in any way liable to the bank by reason of it."

So, too, in *Patrick* v. *Arkansas National Bank*, 172 Ark. 1103, 292 S. W. 143. A federal statute forbade the bank's lending more than ten per cent of its capital and surplus to one borrower. The Ozark Poultry Company had become indebted to it to that amount. The Company desired a further advance and to circumvent the statute the Company's president and directors executed their note to the bank for the desired advance. The proceeds of the loan were appropriated by the Company. The Court stated that the loan could not be viewed as having been made to the Company, saying:

> "Unquestionably, these individuals, the makers and endorsers of the note, had the right to borrow money from the bank and it was not unusual for them to do so, and lend it to the corporation, of which they were directors and stockholders."

The instant case is much stronger than either of the cases quoted from since in each of those cases the maker of the note had a personal interest served by delivery of the proceeds to the party accommodated. The petitioner here had no such interest.

We submit that the foregoing authorities conclusively establish that the loan to the petitioner was not unlawful. But even if the loan were technically illegal, The Taylor National Bank suffered no damage because of it. The record shows without contradiction that the Bank received a note executed by a solvent maker, attached to which was collateral amply sufficient to secure its payment, and even if it be conceded that the loan was illegal, the Bank was not damaged in advancing that loan. It could have collected its debt in full but for the subsequent conversion of that collateral by Morton. Morton's misappropriation of this particular collateral was only one of many like acts by him. It would have occurred if petitioner had borrowed the money for his own use. If Morton had been replaced as the chief executive officer of the Bank and the collateral subsequently misappropriated by his successor, it could not be contended that the petitioner would be unable to set off against his liability on the note the amount of the converted collateral. In such a case the Bank would be chargeable with the wrongful act of its officer. So, in the instant case, the Bank must bear the loss resulting from Morton's illegal conversion of the collateral. This was the act which caused the loss. Of such misappropriation petitioner had no knowledge.

The theory advanced is lucidly expounded in *United States* v. *Choteau,* 102 U. S. 603. There the United States sued the surety upon a distiller's bond which was conditioned that the distiller shall in all respects comply with the provisions of law relating to the duties and business of distillers. The complaint was that the distiller omitted making true book entries required of him by law and that because of such omissions he was enabled to defraud the United States of internal revenue taxes. The surety answered that the omissions charged in the complaint did not contribute to the loss sustained by the United States, but that the loss was due solely to the distiller's removal of spirits untaxpaid in conspiracy with certain revenue officers. Judgment was for the surety company, the Court stating:

> "It is certainly one way of defending against the charge of a wrongful act for which damages are sought to show that notwithstanding the wrong committed the damages resulted from other causes, however objectionable a pleading might be with averments to that effect instead of a distinct traverse of the allegations of the complaint. If, for example, a party should charge another with inflicting upon his person a wound by which he lost an arm, it would be a good defense to show that the loss resulted from unskillful medical treatment or negligence and not from the wound inflicted. So here it is enough for the sureties to show that the loss to the Government was produced by other means than the particular breach of duty by their principal of which the Government complains. It is of no consequence to them, so far as

the present action is concerned, how many sins of omission or commission he may have committed if they can show that the particular damage claimed was not the result of the one charged."

It is well established that damages to be recoverable must arise as the immediate and natural result of the act done and not from the interposition of additional cause, without which the act done would have produced no harmful result. The execution of the note in the instant case by the petitioner did not result in damage to the Bank. Its loss occurred solely by reason of the illegal conversion of Morton.

The Court Erred in Holding That in Making the Loan Set Out Above Morton Played the Role of Borrower Only and Not That of Representative of the Bank.

At the time the loan was made, Morton was not only the president and chief executive officer of the Bank, but also he owned seventy-six per cent of its capital stock. He was in exclusive control of the Bank and directed all its operations. Where the agent or officer of a corporation is in such complete control and so dominates its affairs, it must be considered that he is the sole agency through which the corporation exercises its will in carrying out its business. Thus Morton was the sole agency representing the Bank in the particular transaction here involved. Under such circumstances, the agent and the principal being identical, it is concluded by all authorities that notice to or knowledge of the agent must of necessity be regarded as

notice to or knowledge of the principal, even though the agent or officer may have an individual interest in the matter adverse to that of the principal. As stated in *Anderson* v. *Missouri State Life Insurance Co.* (C. C. A. 6th), 69 Fed. (2d) 794:

> "When members of a board or committee representing a corporation surrender their powers to an individual, either within or without such board or committee, who completely dominates, and through whom only the corporate powers are exercised, such board or committee is the sole actor with but a single will and purpose, or else the dominant individual is the sole actor and the others are to be ignored as if they did not in fact, as they do not functionally, exist. However considered, the principal is the same. So applying the 'sole actor' doctrine, we cannot distinguish this case either from the third phase of the Kean case, *supra* [Kean v. National City Bank, 294 Fed. 214], or from the holdings of this Court in National City Bank v. Carter, 14 Fed. (2d) 940, and National City Bank v. Carter, 31 Fed. (2d) 25."

The Findings of Fact bring this case well within this rule. In making the loan from the Bank upon the note which he induced the petitioner to sign, Morton was acting within the scope of his authority. Morton being the Bank's sole representative in procuring the note, it cannot claim any right to the note except such as it acquired through him, and it cannot take the benefit of his act without taking also the burdens resulting from the agreement which he made and under which

he procured the note to be executed. The Findings of Fact clearly show a breach of the contract pursuant to which the note was executed and notice of this breach must be imputed to the Bank. *Curtis, Collins & Holbrook Co.* v. *United States,* 262 U. S. 215; *Skud* v. *Tillinghast* (C. C. A. 6th), 195 Fed. 5; *Monroe* v. *Harriman National Bank* (C. C. A. 2d), 85 Fed. (2d) 493; *Connecticut Life Insurance Co.* v. *Commercial National Bank* (C. C. A. 5th), 87 Fed. (2d) 968; *Maryland Casualty Co.* v. *Queenan* (C. C. A. 10th), 89 Fed. (2d) 155.

This Court, in *Rankin* v. *City National Bank,* 208 U. S. 541, and in *Deitrick* v. *Standard Surety & Casualty Co.,* 303 U. S. 471, held that in a suit by the receiver of a national bank to recover the amount of fictitious receivables placed in the bank through the connivance of third persons and bank officials with intent to receive bank examiners, the receiver stood in no better position than the bank, and that since the bank was chargeable with the fraud of its officers the receiver was precluded from recovering from third persons. Under the decisions of this Court we respectfully submit that recovery on the note should be precluded.

The Court Erred in Holding This Case to be Controlled by the Decision of This Court in *Deitrick* v. *Greaney* (1940), 309 U. S. 190, Thus Deciding That This Court in That Case Overruled Its Former Decision in *Deitrick* v. *Standard Surety & Casualty Co.* (1938, 303 U. S. 471.

In *Deitrick* v. *Greaney* (1940), 309 U. S. 190, the defendant, a director of a national bank, was sued by its receiver upon a note knowingly given to the bank as a substitute among its assets for shares of its stock illegally purchased and retained. The bank was prohibited by the National Bank Act (12 U. S. C. A., Section 83) from purchasing and retaining its own shares.

In *Deitrick* v. *Standard Surety & Casualty Co.* (1938), 303 U. S. 471, the defendant had guaranteed certain notes by the execution of guaranty bonds. These bonds were fraudulently issued by the defendant's agent on the assurance of the president of the bank that they were to be "window dressing."

In *Deitrick* v. *Greaney* the defendant was a director of the bank and he had full knowledge of the unlawful purpose of his act. The opinion states that the entire transaction was devised and carried out by him for the unlawful purpose of concealing the bank's ownership of its stock. In the instant case the Findings of Fact conclusively show that the note in question was not given for any unlawful purpose and that when, more than seven months after its execution, the collateral was converted, petitioner reported this fact to the Bank's Board of Directors. Petitioner had no part in

the action which really caused the loss to the Bank. Greaney, on the other hand, formulated the scheme to permit the bank to illegally procure the stock of the bank to be owned in fact by the bank and yet not to so appear. He was the guiding spirit in the transaction. In the instant case there was no violation of any statute by petitioner and there was no illegality in the transaction on his part. Such illegality was present in *Deitrick* v. *Greaney.*

In *Deitrick* v. *Standard Surety & Casualty Co.* there was no allegation that creditors or bank examiners were deceived; none of any loss to creditors resulting from the giving of the note; none that the receiver sued on behalf of creditors, and no cause of action asserted except one to recover upon the note as an asset of the bank. In the instant case the respondent's complaint is rested solely upon the note. As in *Deitrick* v. *Standard Surety & Casualty Co.,* no allegations concerning creditors or bank examiners appear. It is true that none appeared in *Deitrick* v. *Greaney,* but in that case it was apparent that the public policy evidenced by the National Bank Act disabled the defendant, in view of the intended deception, from asserting the lack of consideration for the note. But in *Deitrick* v. *Greaney* it was established that the National Bank Act had been violated. In *Deitrick* v. *Standard Surety & Casualty Co.* a wrong had been perpetrated upon the national banking law which took the form of a deception of bank examiners. The Act itself was not violated. The petitioner in the instant case certainly could be guilty of no more than that of

which the surety company was guilty in *Deitrick* v. *Standard Surety & Casualty Co.* Petitioner's wrong could not be analogous to the offense of Greaney, who perpetrated a criminal act and specifically violated a clear provision of the National Bank Act. The effect of the decree of the Circuit Court of Appeals is to permit the receiver to successfully urge that he represents creditors and not the bank; that the public policy evidenced by the National Banking Act prevents the petitioner from asserting his agreement with Morton. These contentions were held to be unavailing to the receiver under pleadings identical to those of the instant case in *Deitrick* v. *Standard Surety & Casualty Co.,* where the wrong committed was certainly no less than the petitioner's in the instant case.

The Circuit Court of Appeals' decree, therefore, extends the doctrine of *Deitrick* v. *Greaney* in such a way as to contravene the decision of this Court in *Deitrick* v. *Standard Surety & Casualty Co.* We do not believe that this Court intended its decision in *Deitrick* v. *Greaney* to have the effect of overruling its decision in *Deitrick* v. *Standard Surety & Casualty Co.,* and because of the public importance of the question, it should be decided by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and reversing the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

ERNEST WOODWARD,
Louisville, Ky.,
Counsel for Petitioner.

JAMES E. FAHEY,
WOODWARD, DAWSON & HOBSON,
Of Counsel.

November 13, 1941.

Office - Supreme Court, U. S.
FILED
DEC 13 1941
CHARLES ELMORE CROPLEY
CLERK

14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 748

JOHN L. VEST,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK, CAMPBELLSVILLE, KENTUCKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

FRANCIS C. BROWN,
JAMES M. KANE,
Attorneys for Respondent.

WILSON W. WYATT,
PETER, HEYBURN, MARSHALL & WYATT,
BALDWIN C. BURNAM,
Of Counsel.

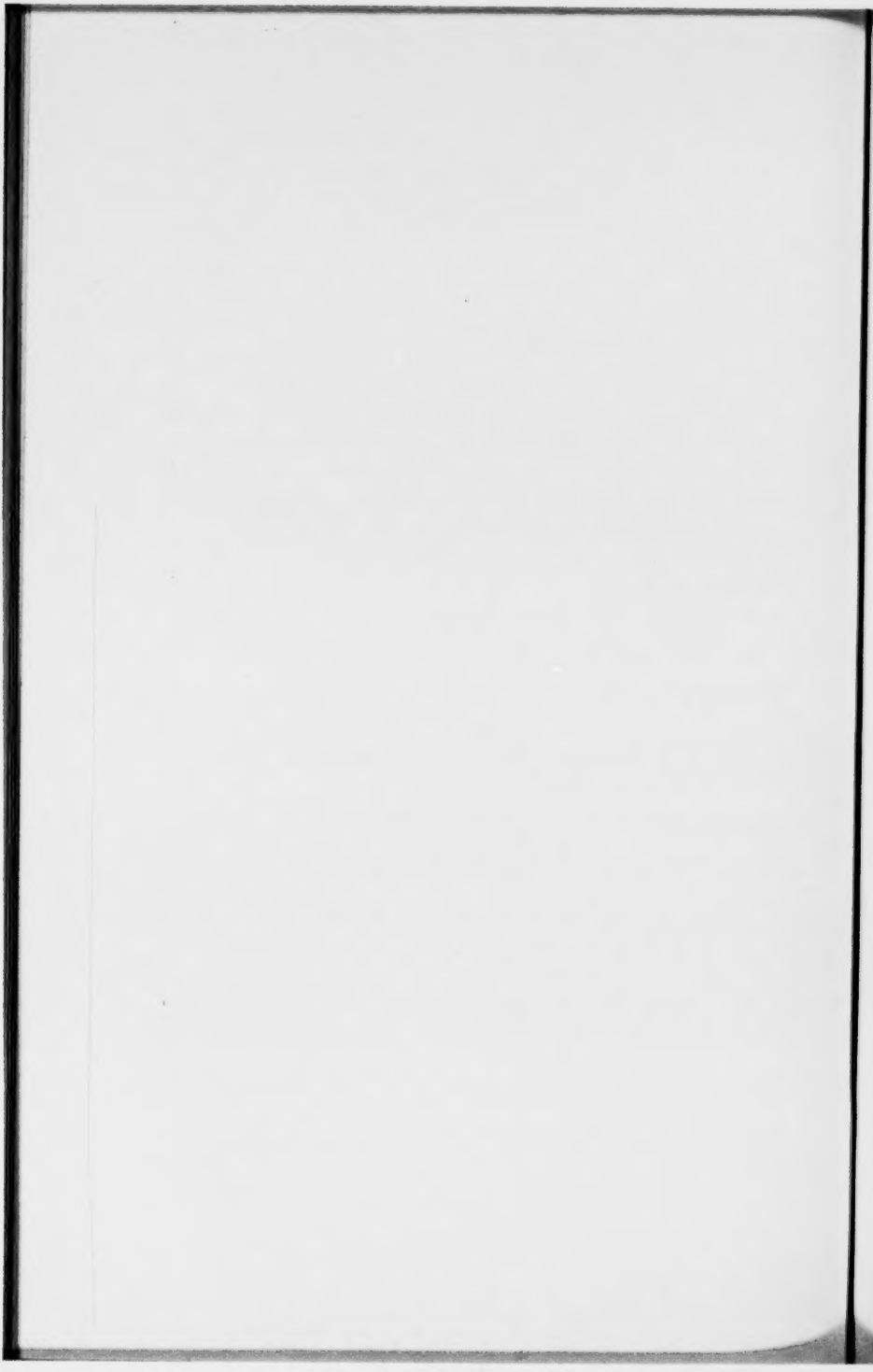
INDEX.

Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement of matter involved	3
Argument	6
The Circuit Court of Appeals held that defense was illegal—not the cause of action	6
The proof does not make out a case for the application of the "sole actor" doctrine	6
Circuit Court of Appeals decision does not conflict with decisions in other circuits nor of this Court	8
Conclusion	9

Table of Cases Cited.

Citizens National Bank of Glasgow v. *Damron*, 286 Ky. 43, 149 S. W. (2) 761	9
Connecticut Fire Insurance Co. v. *Commercial National Bank*, 87 Fed. (2d) 968	8
Curtis, Collins & Holbrook Co. v. *U. S.*, 262 U. S. 215	8
Deitrick v. *Greaney*, 309 U. S. 190	6, 8
Deitrick v. *Standard Casualty & Surety Co.*, 303 U. S. 471	7, 9
General Talking Pictures v. *Western Electric Co.*, 304 U. S. 175	2
Maryland Casualty Co. v. *Queenan*, 89 F. (2d) 155	8
Munroe v. *Harriman National Bank*, 85 F. (2d) 493, cert. den. 299 U. S. 601	8
Rankin v. *City National Bank*, 208 U. S. 545	7
Skud v. *Tillinghast*, 195 Fed. 5	8



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 748

JOHN L. VEST,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK, CAMPBELLSVILLE, KENTUCKY,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court of the United States for the Eastern District of Kentucky, Covington Division (T. 147-151), is reported in 28 Fed. Supp. 507. The opinion of the Circuit Court of Appeals for the Sixth Circuit (T. 166-173) was originally reported in 119 F. (2d) 834 (Advance sheets), was withdrawn by order of the court before the permanent bound volume was published, and has been republished in 122 F. (2d) 765 (Advance sheets).

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was entered on May 14, 1941 (T. 165). A petition for rehearing was denied on October

10, 1941 (T. 221). The petition for a writ of certiorari was filed November 15, 1941, and a copy thereof served on respondent on November 18, 1941.

The petition for a writ of certiorari does not contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction,[1] but it is stated at page 10 of the brief in support of the petition that the jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 347).

Questions Presented.

Neither the petition for a writ of certiorari [1] nor the brief in support thereof [2] contain a statement of the questions presented. The record clearly establishes and petitioner conceded in his petition for rehearing filed below (T. 181) as well as argues in his petition for writ of certiorari, pp. 11-13, that the original note was his legal and binding obligation. The real questions which petitioner presents, as we conceive them, are:

(1) Has petitioner met the burden of proving the alleged conditions and limitations of Morton's authority as petitioner's agent with respect to the maintenance of collateral having sufficient value to pay petitioner's note?

(2) Has petitioner met the burden of proving that Morton breached or violated his alleged duty as such agent?

Statutes Involved.

The essential portions of statutes involved are set forth in the petition for writ of certiorari, page 6.

---

[1] As required by Rule 38 (2) of this Court.

[2] The supporting brief is not a part of the petition for this purpose. See *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178.

Statement of Matter Involved.

The respondent, Federal Deposit Insurance Corporation, as Receiver of the Taylor National Bank of Campbellsville, Kentucky (hereinafter called the bank), brought suit in the Federal court against petitioner and others (T. 1-5). For the purposes here involved respondent's bill in equity sought judgment against petitioner for $10,000 (T. 4) plus interest due (T. 4, 30-1) on a promissory note dated January 12, 1937 (T. 2, 6). Petitioner answered, admitting that he executed the note (T. 11) but asserted by way of affirmative defenses that the bank was a "one-man" institution with one Morton completely in domination of its management and affairs (T. 13) and that since Morton was the sole actor in the transactions here under consideration (T. 13),

I. knowledge of Morton's representations that he was the owner of certain securities of the then market value of about $12,000, which he would furnish and pledge as collateral to petitioner's note (T. 14), was imputed to the bank; and

II. that the bank took the notes subject to (a) Morton's promise that the bank would never require or request petitioner to pay any part of the note (T. 15), (b) Morton's promise (which petitioner alleges to have been later breached) to maintain at all times thereafter collateral to the extent of at least $12,000 market value and to increase the margin of collateral if criticized by national bank examiners (T. 14, 15), (c) the limitation and condition imposed by petitioner upon Morton's authority (which petitioner alleges the latter violated) to deliver the note here involved only upon simultaneously pledging securities of the then market value of at least $12,000 (T. 18-20).

The case was tried on May 5, 1938 (T. 36), the District Court holding that recovery on the note here involved was

precluded because the evidence disclosed "a breach of the contract pursuant to which the note was executed" and that notice thereof was imputed to the bank (T. 150-1).

In ordering judgment for petitioner, the trial court found that the bank was a "one-man" bank (T. 158); that on January 24, 1935, petitioner signed a blank note in favor of the bank as well as a $10,000 check drawn on the bank payable to Morton's designee (T. 155) after Morton had represented to petitioner that he was the owner of certain specifically described securities having the then market value of around $12,000 (T. 154), and had promised that he would pledge those securities as collateral to petitioner's note; that he would pledge additional collateral if criticism were made by bank examiners; that he would pay the interest on the note and that he would pay the full amount thereof with the proceeds of the sale of the collateral when it would reach a satisfactory price (T. 154). The court also found that Morton filled out the note for $10,000 and placed it, together with the collateral described in his conversation with petitioner, among the assets of the Bank, the proceeds being credited to petitioner and his $10,000 check charged to the credit so created (T. 155). The trial court further found that petitioner, at Morton's request, executed five renewals of the note, each of which was signed by petitioner in blank and delivered to Morton, who later filled in the body of the notes with proper dates and amounts as well as correct descriptions of the collateral purporting to be pledged as security to each respective note (T. 155-6). Collateral described in the last renewal note (being the one on which this suit was brought) was found in the collateral files of the bank when it closed (T. 157), although it was worth only $2,443.00 (T. 158) and was adjudicated by the trial court to be the property of certain trustees who had placed it with the bank for safekeeping (T. 157)

The trial court made no findings and the record is devoid of any proof with respect to the following vital elements of defenses (even assuming that they would be availing here) interposed by petitioner, viz:

(1) that Morton was not the owner of the collateral which petitioner testified described by the former in his January 24, 1935, conversation with petitioner;

(2) that Morton or anyone else promised petitioner that the bank would never require or request him to pay the note;

(3) that Morton promised to maintain at all times after January 24, 1935, collateral of the value of $12,000 or more to secure petitioner's note;

(4) that national bank examiners ever criticized petitioner's note from the standpoint of inadequacy of collateral; nor

(5) that the authority conferred by petitioner upon Morton to deliver the renewal note here involved was conditioned upon Morton's simultaneous delivery to the bank of collateral having a value of at least $12,000.

On the contrary, the trial court found that the collateral described by Morton in his conversation of January 24, 1935, was pledged to secure the original note signed by petitioner (T. 155) and that while petitioner was not actually aware of the removal of any of the original collateral (T. 157), yet "he was aware that Morton had reserved the right to change the collateral from time to time—" (T. 157).

On appeal the Circuit Court of Appeals reversed, holding that public policy prohibited petitioner from defending on the ground that there was an agreement by Morton which would nullify petitioner's original and renewal notes (T. 169). The appellate court also rejected as immaterial,

petitioner's alleged defense "that Morton *in the early stages* undertook to indemnify appellee by the pledge of collateral—" (T. 170). (Italics supplied.)

Argument.

The Circuit Court of Appeals Held that Defense was Illegal—Not the Cause of Action.

The gist of the argument under petitioner's first point is that the original note was his legal, valid and binding obligation. Respondent understands and interprets the decision of the Circuit Court of Appeals to hold precisely as petitioner contends on this question. As petitioner states at page 3 of his petition it was the defense set up by petitioner, not the note itself, which the court held to be invalid, as against public policy, when it said:

> "The defense, as averred in the answer to the bill, and as set out in the proof,—that by virtue of an agreement between Morton and appellee, the original note and its various renewals were nullities—must fail" (R. 169).

relying on the doctrine laid down by this Court in *Deitrick* v. *Greaney,* 309 U. S. 190.

The Proof Does Not Make Out a Case for the Application of the "Sole Actor" Doctrine.

Under the second point of his argument petitioner contends that this case comes within the "sole actor" rule and that he should be absolved from liability. Assuming for the present purposes that the bank was a "one man" bank, and that Morton was the sole actor in the transactions here involved, petitioner failed to meet the burden of proving either that Morton misrepresented any material existing

fact or that he breached any alleged promise made to petitioner. (See our analysis of proof at trial, page 5, *supra.*)

Petitioner states at page 23 of his brief that the "Findings of Fact clearly show a breach of the contract pursuant to which the note was executed—" but fails to point out the particulars of such findings. Possibly petitioner is referring to that statement in the trial court's findings of fact, viz., "Vest at no time authorized or agreed to the change in the collateral security pledged upon the $10,000 note and its renewals" (T. 158). Reading the sentence just quoted in the light of the court's prior finding that petitioner "was aware that Morton had reserved the right to change the collateral from time to time" (T. 157) it is in reality a conclusion of law (and contrary to petitioner's own testimony T. 80) rather than a finding of fact, because there is no proof or even inference that petitioner objected to Morton's reserved "right to change the collateral." If the court's statement concerning the absence of authority from petitioner to change the collateral is to be considered as a finding of fact then it is immaterial because there is no finding (and no proof to support one) that Morton agreed to maintain the same collateral or even collateral of equal value, throughout the existence of petitioner's renewals.

Assuming further for the present purposes that in these circumstances respondent as receiver stands in no better position than the bank, as petitioner contends was held in *Rankin* v. *City National Bank*, 208 U. S. 545, and *Deitrick* v. *Standard Casualty & Surety Company*, 303 U. S. 471, the subject bank, were it now an operating institution, would be entitled to recover here, because, as petitioner argues, he was clearly liable on the original note and, as has been pointed out (*supra*, p. 5), he has failed to meet the burden of proving the elements of any of the affirmative defenses interposed to this action on the renewal.

CIRCUIT COURT OF APPEALS DECISION DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS NOR OF THIS COURT.

Petitioner does not specifically urge in his petition as a reason for granting a writ of certiorari that the decision of the Circuit Court of Appeals below is in conflict with the decisions of other circuit courts of appeal, but he contends at page 23 of his supporting brief that such a conflict does exist. We think it has been clearly demonstrated that there has been no proof below of either (1) a contract (agency or otherwise), concerning the pledging or maintenance of $12,000 or more in collateral, pursuant to which petitioner alleges the last renewal was executed or (2) the breach of any promise or agreement related to the last or any prior renewal note.

Contracts as between the complaining parties and the sole actors as well as breaches of such contracts were not only alleged but also proven in the cases of *Curtis, Collins & Holbrook Co.* v. *U. S.*, 262 U. S. 215; *Skud* v. *Tillinghast* (C. C. A. 6th), 195 Fed. 5; *Munroe* v. *Harriman National* Bank (C. C. A. 2d), 85 F. (2d) 493, cert. denied 299 U. S. 601. In *Connecticut Fire Insurance Co.* v. *Commercial National Bank* (C. C. A. 5th), 87 F. (2d) 968, the bank sought to retain the stolen bonds which it had purchased through its "sole actor" agent but here the bank has never received (T. 221) and is not seeking to retain any benefits of the collateral allegedly converted. While the "sole actor" rule was involved in the case of *Maryland Casualty Co.* v. *Queenan* (C. C. A. 10th), 89 F. (2d) 155, the real issue there was between the bank and the surety on the "sole actor's" fidelity bond as an officer of the bank, whereas the issue here is between the two principals who were both represented by the same "sole actor" agent.

The principal fallacy underlying the argument under petitioner's last point, viz., that the decision below may conflict with the decision of this Court in *Deitrick* v. *Standard Surety & Casualty Co., supra,* lies in the unfounded assumption that recovery could not be had by the bank in the case at bar. The Standard Surety & Casualty Company defended on the grounds that the bonds there sued upon were executed by its agent not only without authority but also without consideration, and that the bank was charged with knowledge of these facts. The surety company met the burden of proving its defenses, whereas petitioner here has failed to do so,[3] and the defense of no consideration does not lie in an action by the payee against the maker of an accommodation note. See *Citizens National Bank of Glasgow* v. *Damron,* 286 Ky. 43, 149 S. W. (2) 761.

Conclusion.

For all of which it is respectfully submitted that the decision of the Circuit Court of Appeals is correct, that there is no conflict of decisions, that no question of statutory construction nor of public importance is here presented and that the petition for a writ of certiorari should be denied.

FRANCIS C. BROWN,
JAMES M. KANE,
Attorneys for Respondent.

WILSON W. WYATT,
PETER, HEYBURN, MARSHALL & WYATT,
BALDWIN C. BURNAM,
Of Counsel.

---

[3] See, *supra,* p. 5.

I hereby authorize the filing of the foregoing brief.

Charles Fahy
Solicitor General